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DUAL NATIONALITY AND ELECTION

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Pradier-Fodéré in his learned work on Public International Law¹ discussed with particular care and at considerable length the difficult question of conflicts of nationality laws. After proposing certain solutions and explaining the benefits to be derived therefrom, he concluded by pointing out one crowning benefit, namely, that it would "end "those interminable dissertations on the accumulation of nationalities." My excuse for adding to these dissertations is the fact that, though a third of a century has elapsed since Pradier-Fodéré's book was published, the problem of dual nationality remains unsolved, and very little progress, if any, has been made toward a solution. So long as in the laws of half of the countries of the world nationality continues to be based primarily upon place of birth (*jus soli*), while in the laws of the other half it is based primarily upon descent (*jus sanguinis*), the problem will continue to exist, to the confusion of the individuals concerned and the harassment of the foreign offices of the countries whose protection they seek or whose demands they attempt to evade, unless a solution is reached by international agreement. The problem is not made simpler by the fact that most of the countries whose laws of nationality are based upon *jus soli* have engrafted upon them, to a greater or less extent, the rule of *jus sanguinis*, while many of the countries holding to the latter rule have engrafted upon their laws, in one way or another, rules deduced from *jus soli*. The object of these countries seems to be simply to gather into their citizenship the greatest possible number of persons, and, of course, this does not

¹ 2 Pradier-Fodéré, *Traité de droit international public* (1887).

work for international harmony. In the following pages the nationality laws of the various countries of the earth, and particularly our own country, will be briefly reviewed. Special attention will be given to the efforts which have been made to settle questions of dual nationality, by legislative enactment or executive practice, and the possibility of a general solution will be considered.²

Of the two principles of nationality *jus sanguinis* is probably the older. It seems that in ancient times the nation was viewed as a collection of tribes, more or less related, the tribes being made up of clans, and the clans of families. Although nations usually came to occupy well defined territories upon attaining civilization, they continued for a long time to be regarded as a collection of tribes, clans, and families, rather than as a single people subject to territorial jurisdiction. Under such conditions it was natural that nationality should have little if anything to do with place of birth. Roman citizenship seems to have been originally of this nature.³

On the other hand *jus soli* seems to have originated with the feudal system, under which all persons, with certain limited exceptions, born within the fief of an over-lord were held to owe fealty to him and allegiance to the sovereign.

Our own law of citizenship was derived from the English common law, in which *jus soli*, or the feudal principle, prevailed. Some years ago Mr. Prentiss Webster published a book on citizenship, a great part of which was devoted to an argument that American citizenship is not based upon the feudal theory. While it may be truly said that it is not based upon feudalism, the fact remains that feudalism was the seed from which it sprang. The seed decayed long ago, and the vine, so to speak, has been transplanted from English to American soil, where, for reasons which we shall note later, it has flourished and will no doubt for many years continue to flourish.

ENGLISH LAW OF NATIONALITY

The leading English court decision on the question of citizenship by birth is Calvin's Case,⁴ which was tried in the year 1608 in the Exchequer Chamber before the Lord Chancellor and all of the Judges of England. This case is celebrated, not only for the importance of the decision made, but also for the form of Lord Coke's report. According

² This discussion relates only to native citizenship, and not to citizenship acquired through naturalization. As the United States is committed to the doctrine of the right of expatriation, the existence of dual nationality is not admitted in cases of naturalization.

³ See Maine, *Ancient Law* (Pollock's ed. 1906) ch. 5; Howe, *Studies in the Civil Law* (1896) Lecture 2; 1 Westlake, *International Law* (2d ed. 1910) ch. 10; 2 Calvo, *Droit internationale* (5th ed. 1896) livre 8; Geouffre de Lapradelle, *De la nationalité d'origine* (1893) ch. 1.

⁴ (1608) Coke, pt. VII, 1, 3b.

to the custom of the time, he did not quote verbatim the opinions of the judges, but gave a digest of them in his own language.⁵ It appears that Robert Calvin was born in Edinburgh in the third year of the reign of James I as King of England and the thirty-ninth year of his reign as King of Scotland. It was held that he had, by the fact of his birth within the King's dominions, the status of a British subject in England, and not merely the status of a subject of James as King of Scotland. In his report Lord Coke made the following observations concerning the nature of allegiance and the basis of nationality under the common law:

"Ligeance is the mutual bond and obligation between the King and his subjects, whereby subjects are called his liege subjects, because they are bound to obey and serve him; and he is called their liege lord, because he should maintain and defend them. Whereby it appeareth, that in this point the law of England and of Scotland is all one. Therefore it is truly said that *protectio trahit subjectionem, et subjectio protectionem*" (5a).

"They that are born under the obedience, power, faith, ligealty, or ligeance of the King, are natural subjects, and no aliens" (5b).

"Calvin the plaintiff being born under one ligeance to one King,

⁵ "This case," says Coke,

"was as elaborately, substantially, and judicially argued by the Lord Chancellor, and by my brethren the Judges, as I ever read or heard of any; and so in mine opinion the weight and consequence of the cause, both *in praesenti et perpetuis futuris temporibus* justly deserved: for though it was one of the shortest and least that ever we argued in this court, yet was it the longest and weightiest that ever was argued in any court, the shortest in syllables, the longest in substance; the least for value (and yet not tending to the right of that least) but the weightiest for the consequent, both for the present, and for all posterity."

Because of the quaintness of the language and the beautiful view of the law which it gives, I cannot refrain from quoting the following passage from this same remarkable report:

"And in the arguments of those that argued for the plaintiff, I specially noted, that albeit they spake according to their own heart, yet they spake not out of their own head and invention: wherein they followed the counsel given in God's book, *interroga pristinam generationem* (for out of the old fields must come the new corn) *et diligenter investiga patrum memoriam*, and diligently search out the judgments of our forefathers, and that for divers reasons: first on our own part, *Hesterni enim sumus et ignoramus, et vita nostra sicut umbra super terram*; for we are but of yesterday, (and therefore had need of the wisdom of those that were before us) and had been ignorant (if we had not received light and knowledge from our forefathers) and our days upon the earth are but as a shadow, in respect of the old ancient days and times past, wherein the laws have been by the wisdom of the most excellent men, in many successions of ages, by long and continual experience, (the trial of right and truth) fined and refined, which no one man, (being of so short a time) albeit he had in his head the wisdom of all the men in the world, in any one age could ever have effected or attained unto. And therefore it is *optima regula, qua nulla est verior aut firmitior in jure, neminem oportet esse sapientiore legibus*; no man ought to take upon him to be wiser than the laws. Secondly, in respect of our forefathers: *ipsi* (saith the text) *docebunt te, et loquentur tibi, et ex corde suo proferent eloquia*, they shall teach thee, and tell thee, and shall utter the words of their heart, without all equivocation or mental reservation; they (I say) that cannot be daunted with fear of any power above them, nor be dazzled with the applause of the popular about them, nor fretted with any discontentment (the matter of opposition and contradiction) within them, but shall speak the words of their heart, without all affection or infection whatsoever."

cannot be an alien born. . . . Ligeance of the subjects of both kingdoms, is due to their Sovereign by one law, and that is the law of nature" (14 b).

"There be regularly (unless it be in special cases) three incidents to a subject born. 1. That the parents be under the actual obedience of the King. 2. That the place of his birth be within the King's dominion. And, 3. The time of his birth is chiefly to be considered; for he cannot be a subject born of one kingdom that was born under the ligeance of a King of another kingdom, albeit afterwards one kingdom descend to the King of the other" (18a).

Dicey evidently had the decision in Calvin's Case in mind when he made the following analysis of the principle of *jus soli* in the law of England:

"It is well to notice that allegiance, though it practically depends upon the place of a person's birth, theoretically depends upon a person's being born under the control and within the protection of a particular sovereign, and therefore only indirectly on the place of a person's birth. This consideration explains most of the exceptions to the rule that a person born within British territory is a British subject."⁶

"By the Common Law of England," says Cockburn, "every person born within the dominions of the Crown, no matter whether of English or of foreign parents, and, in the latter case, whether the parents were settled, or merely temporarily sojourning, in the country, was an English subject; save only the children of foreign ambassadors (who were excepted because their fathers carried their own nationality with them), or a child born to a foreigner during the hostile occupation of any part of the territories of England. No effect appears to have been given to descent as a source of nationality."⁷

In this concise summing up of the English common law on nationality I call special attention to the words, "whether the parents were settled, or merely temporarily sojourning in this country," since they relate to a point to which I shall advert later in discussing our own law of nationality.

The last sentence in Cockburn's statement raises a question which has been the subject of much discussion. A number of writers, some of the highest authority, have disagreed with the opinion expressed by Cockburn and have contended that the principle of *jus sanguinis*, as well as that of *jus soli*, was contained in the common law of England. This question has been a subject of controversy for six centuries or more, and I shall not try to settle it in the present article.⁸ The first attempt in England to fix by statute the status of persons born abroad of English parents was made in the reign of King Edward III. Con-

⁶ Dicey, *Conflict of Laws* (2d ed. 1908) 166, n. 4.

⁷ Cockburn, *Nationality* (1869) 7.

⁸ In his opinion in *Lynch v. Clarke* (1844, N. Y. Ch.) 1 Sandf. 583, Judge Sandford mentioned such high legal authorities as Lord Bacon, Chief Justice Tindal, Baron Parke, and Chancellor Kent as holding that *jus sanguinis* was a part of the common law, but equally high authorities have held the contrary view.

cerning this statutory enactment Cockburn gives the following account:⁹

"It appears from the Parliamentary Rolls of the reign of Edward III., that as early as the 17th of that king (1343), doubts having arisen whether even the king's sons born without the realm could inherit, the Archbishop of Canterbury brought the question before the Lords. The Lords replied unanimously that there was no doubt that the king's sons could inherit, wherever born, but that with regard to children of other persons there were great difficulties in deciding the question. The matter was again brought before the Lords and Commons jointly, who concurred in the opinion previously given by the Lords, and recommended that a law should be passed on the subject; but, as Parliament was about to be prorogued, 'et ceste besoigne demand grant avisement' 'et bone deliberation coment ele se purra mieltz faire, et plus surement,' the further consideration of it was deferred. (Rotuli Parliamentorum, vol. ii, p. 139. Appendix to Report of Commissioners, p. 6.)

"Owing to the plague, legislation on this and other subjects was not resumed till the year 1350, when the Act 25 Edward III. stat. 2 was passed, entitled 'A statute for those that be born beyond sea.' By this statute it is provided 'that all children inheritors which from henceforth 'shall be born without the legiance of the king, whose fathers and 'mothers at the time of the birth be and shall be at the faith and legiance 'of the King of England, shall have and enjoy the same benefits and 'advantages, to have and bear the inheritance within the same legiance, 'as other inheritors aforesaid in time to come; so always the mothers 'of such children do pass the sea by the license and wills of their husbands.'

"It has been said that this statute was only declaratory of the Common law. (See what is said by Lord Bacon when arguing as counsel in Calvin's case, 2 State Trials, p. 585.) But this view is hardly consistent with its language, which is prospective, and refers only to children which 'from henceforth shall be born;' and it has been pertinently observed that if the statute had only been declaratory of the Common Law, the subsequent legislation on this subject would have been wholly unnecessary."

By the statute 7 Anne, c. 5 (1708), it was declared that "the children "of all natural-born subjects" (not merely children inheritors) should be deemed to be "natural-born subjects" of the Crown.

By the Act 4 George II, c. 21 (1731), it was provided that children born abroad "whose fathers were or shall be natural-born subjects of "the Crown of *England*, or of *Great Britain*" should be considered natural-born subjects of the Crown. According to this statute it seems that British nationality was inherited through fathers only. Under the two statutes just mentioned British nationality did not descend beyond the first generation of those born abroad, but by the statute of 13th George III, c. 21 (1773) it was extended to the second generation. Finally the statutes mentioned were replaced by the British Nationality and Status of Aliens Act, 1914, the first section of Part I of which provides that

⁹ Cockburn, *op. cit.*, at pp. 7, 8.

"the following persons shall be deemed to be natural-born British subjects, namely:

"(a) Any person born within His Majesty's dominions and allegiance; and

"(b) Any person born out of His Majesty's dominions, whose father was a British subject at the time of that person's birth and either was born within His Majesty's allegiance or was a person to whom a certificate of naturalization had been granted; and

"(c) Any person born on board a British ship whether in foreign territorial waters or not."

Section 14 of the Act last mentioned contains provisions under which persons born in British dominions of alien fathers and persons born abroad of British fathers may, upon reaching majority, renounce British nationality by making a declaration of alienage. These provisions had already appeared in the British Naturalization Act, 1870.

AMERICAN LAW OF NATIONALITY

I have spoken in some detail of the British law of nationality because our own law of nationality was taken from it. While the Constitution of the United States did not in its original form state what persons were to be considered citizens of the United States, it did speak of "natural "born citizens,"¹⁰ and the courts, when called upon to decide who were natural born citizens, held that this term referred to the English common law and should be construed in accordance with it. As early as the year 1804 Chief Justice Marshall, in rendering the decision of the Supreme Court in the case of *The Charming Betsy*,¹¹ had assumed that persons born in the United States were citizens of this country, and in the case of *Inglis v. Trustees of Sailor's Snug Harbor*,¹² Justice Story, in the course of his opinion, said:

"Nothing is better settled at the common law than the doctrine that the children even of aliens born in a country, while the parents are resident there under the protection of the government, and owing a temporary allegiance thereto, are subjects by birth."

The whole subject of native citizenship was thoroughly reviewed by Assistant Vice Chancellor Sandford in his admirable opinion in the case of *Lynch v. Clarke*,¹³ decided in 1844. This opinion is notable for its common sense and originality as well as for its unusual thoroughness and evidence of wide learning. Up to this time citizenship in the United States had been regarded generally as pertaining primarily to the individual states which had separately adopted the English common law, but Judge Sandford treated citizenship as essentially national, and thereby anticipated by more than two decades the declaration con-

¹⁰ Article 2, section 4.

¹¹ (1804, U. S.) 2 Cranch, 64.

¹² (1830, U. S.) 3 Pet. 99, 164.

¹³ *Supra* note 8.

cerning citizenship contained in the Fourteenth Amendment to the Constitution. In the course of his opinion he said:

"The provisions of the Constitution of the United States demonstrate that the right of citizenship, as distinguished from alienage, is a natural right or condition, and does not pertain to the individual states" (p. 641).

"Citizenship . . . is a political right, which stands not upon the municipal law of any one state, but upon the more general principles of national law" (p. 644).

"In my judgment there is no room for doubt, but that to a limited extent, the common law, (or the principles of the common law, as some prefer to express the doctrine,) prevails in the United States as a system of national jurisprudence" (p. 654).

"When the Union was formed and further state regulation on the point terminated, it follows, in the absence of a declaration to the contrary, that the principle which prevailed, and was the law on such point *in all the states*, became immediately the governing principle and rule of law thereon in the nation formed by such union" (p. 655).

"It is indispensable that there should be some fixed, certain and intelligible rules for determining the question of alienage or citizenship. The place of nativity furnishes one as plain and certain, and as readily to be proved, as any circumstance which can be mentioned" (p. 658).

Judge Sandford goes on to observe that, because of the presence in this country of alien immigrants in such large numbers, if *jus sanguinis* should be recognized as the sole basis of nationality, this "might lead to 'the perpetuation of a race of aliens'" (p. 673).¹⁴

On April 9, 1866, Congress passed the Civil Rights Act,¹⁵ which contained the following provisions:

"All persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are declared to be citizens of the United States."

Two years later the Fourteenth Amendment to the Constitution was adopted, the first section of which provided that

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."

As Mr. Van Dyne states, in his excellent and reliable book on *Citizenship of the United States*,¹⁶ "these two definitions, which are practically 'identical, are declaratory of the common law.'" In support of this statement he quotes a number of decisions of courts, and in particular the decision of the Circuit Court of the United States in the case of *Re Look Tin Sing*,¹⁷ and the decision of the Supreme Court of the

¹⁴ This decision was followed by Attorney General Black in an opinion rendered July 18, 1859, 9 Op. Att. Gen. 373.

¹⁵ 14 Stat. at L. 27.

¹⁶ (1904) at p. 7.

¹⁷ (1884, C. C. D. Calif.) 10 Sawyer, 353, 21 Fed. 905.

United States in the case of *United States v. Wong Kim Ark*,¹⁸ in both of which it was held that a person born in the United States of Chinese parents was a citizen of the United States. In these decisions much reliance was placed upon the decision in *Lynch v. Clarke*. The provisions of the Civil Rights Act and the Fourteenth Amendment added nothing to the existing law, except, perhaps, to make it clear that persons born in the United States of African parents are citizens of this country. It has been said that these provisions changed the fundamental law by making citizenship primarily a national, rather than a state, relation, but, as we have observed, this principle had been declared many years before by Assistant Vice Chancellor Sandford in his notable decision in *Lynch v. Clarke*.

Notwithstanding the decisions of the courts mentioned and others to the same effect, the law of this country concerning citizenship by birth has been misstated by a number of writers on international law, who have assumed that, in order that a person born in the United States of alien parents may have American citizenship, his parents must have been domiciled in this country at the time of his birth. This error seems to have originated with Wharton, who seems to have gone so far as to hold that persons born in the United States of alien parents were not citizens of the United States, under the provisions of the Civil Rights Act, since their parents were "subject to a foreign power." He seems to have fallen into the error of construing these words as equivalent to "subjects of a foreign power." He cites several declarations of Secretaries of State in support of his opinion,¹⁹ but these declarations are not in accord with the decisions of the courts. Mr. Hannis Taylor, relying partly upon Wharton, expresses his opinion that "children born in the United States to foreigners here on transient residence are not citizens, because by the law of nations they were not 'at the time of their birth 'subject to the jurisdiction,' " ²⁰ and Wharton's opinion has also been followed by such careful and reliable authors as Hall²¹ and Westlake.²² I should hesitate to question the view expressed by such high authorities were it not for the fact that it is clearly contrary to the decisions of our courts. It is true that the decisions in *Re Look Tin Sing* and *United States v. Wong Kim Ark* did not directly decide the precise point that persons born in the United States of aliens who are mere sojourners or transients are citizens of this country, since in each of these cases the parents were domiciled in the United States, so that it was not at issue. However, both of those

¹⁸ (1898) 169 U. S. 649, 18 Sup. Ct. 456.

¹⁹ 3 Wharton, *International Law Digest* (1886) sec. 183.

²⁰ Taylor, *International Law* (1901) 220, sec. 178.

²¹ Hall, *International Law* (5th ed. 1904) 225.

²² Westlake, *International Law* (1904) 226-7. See also to the same effect the decisions of Thornton, Umpire in Arbitration, July 4, 1868, in the claims of *Suarez v. Mexico* and *del Barco & de Garate v. Mexico* [3 Moore, *International Arbitrations* (1898) 2449].

decisions relied to a considerable extent upon the decision in *Lynch v. Clarke*, in which the person concerned, who was declared to be a native citizen of the United States, was born in this country of alien parents who were mere sojourners. What is more important, all of these decisions were based upon the theory that the law of citizenship of the United States was taken from the common law of England, and the latter makes no distinction between persons born in the country of alien sojourners and those born of domiciled aliens.²³

"But," one may ask, "if a Chinese merchant and his wife are returning from Europe to China via the United States, and a child is born to the woman in San Francisco the day before they sail, is such child, by the mere accident of having first seen the light in this country, a citizen of the United States?" Absurd as it may seem, the child is indeed a citizen of the United States under the law of this country, although it is also a Chinese citizen under the law of China. Although it is unfortunate that such cases are possible, there is, on the other hand, much practical advantage in a system in which mere proof of birth in the United States is sufficient proof of citizenship. This is remarked upon by Judge Sandford in the opinion to which I have called attention.

So much for citizenship through birth in the United States, under *jus soli*, which is the basic principle of our law of nationality. Early in the history of our country, that is, in the year 1790, a statute was passed by which the principle of *jus sanguinis* was added. Under this statute children born abroad of American parents were to "be considered as natural born citizens."²⁴ This statute was replaced in 1795 by another statute²⁵ similar in effect, but with the words "natural born" omitted. For some inconceivable reason, or no reason at all, Congress tinkered with this law again in 1802 and passed an Act²⁶ declaring that persons born abroad should be considered citizens of the United States if they were the children of persons "who now are, or have been, citizens of the United States." In an article on *The Alienigenae of the United States*, published in 1854 and attributed to Horace Binney,²⁷ attention was called to the fact that persons born abroad of citizens of the United States subsequent to the passage of the Act of 1802 could not, under the provisions thereof, be considered citizens of this country. In this article Mr. Binney took the view that *jus sanguinis* was not a part of the common law of England and hence not a part of the common law of this country. To fill this hiatus Congress in 1855 passed a new Act, which reads as follows:

"All children heretofore born or hereafter born out of the limits and jurisdiction of the United States, whose fathers were or may be

²³ Cockburn, *op. cit.* note 7; Hall, *op. cit.*, at p. 227.

²⁴ 1 Stat. at L. 104, ch. 3.

²⁵ 1 Stat. at L. 415, ch. 20, sec. 3.

²⁶ 2 Stat. at L. 155, ch. 28, sec. 4.

²⁷ (1854) 2 AM. L. REG. 193.

at the time of their birth citizens thereof, are declared to be citizens of the United States; but the rights of citizenship shall not descend to children whose fathers never resided in the United States."²⁸

It will be observed that a new principle was introduced by the Act of 1855, namely that citizenship should not descend beyond the first generation born abroad, a wise provision. It is still argued by some persons that *jus sanguinis* is a part of the common law of England, and consequently of the United States, so that the Act of 1855 was merely declaratory, except for the provision last mentioned; but evidently Congress did not hold this view when it passed the Act.

On March 2, 1907, Congress, acting upon the recommendations of a board appointed by the Secretary of State, passed the now well known Expatriation Act,²⁹ the sixth section of which bears upon the status of persons born abroad of American fathers. This provision will be discussed further on, with relation to the question of election of nationality.

NATIONALITY LAWS OF OTHER FOREIGN COUNTRIES

We shall now discuss briefly the nationality laws of other foreign countries so far as they relate to nationality acquired at birth.

There is no country in which native citizenship is based solely upon the principle of *jus soli*, although in Portugal and most of the Latin American countries it seems to be based primarily upon that principle. However, the laws of all of these countries contain provisions under which citizenship is extended, under certain conditions, to persons born abroad of their citizens.

Under the Civil Code of Portugal persons born in that country are Portuguese citizens, but those born of alien fathers are given the privilege of electing the nationality of their fathers.

Under the laws of the following countries citizenship thereof is acquired first, by birth in their territories, and second, by birth abroad of their citizens, provided in the latter case the persons concerned become domiciled in the respective countries: Bolivia, Brazil, Chile, the Dominican Republic, Ecuador, Guatemala, Honduras, Panama, Paraguay, Uruguay, and Venezuela. The law of Columbia is similar, except that children born in that country of alien parents are not citizens thereof unless their parents are domiciled in the country. A provision practically identical with the latter is found in the law of Nicaragua, which also provides that persons born abroad of Nicaraguan parents have Nicaraguan nationality if they make an election thereof. Under the law of Peru persons born therein have Peruvian nationality; likewise those born abroad of Peruvian parents, provided their names are entered in the Civil Registry of Peru by their parents during their minority or by themselves upon reaching their majority.

²⁸ U. S. Rev. St. 1873, sec. 1993.

²⁹ 34 Stat. at L. 1228.

In Spain under the Constitution and Article 17 of the Civil Code the following are Spaniards: (1) persons born in Spanish territory, and (2) children of a Spanish father or mother, although born out of Spain, but the first provision is qualified as follows by Articles 18 and 19 of the Civil Code:

"18. Children, while they remain under the parental power (*patria potestad*), have the nationality of their parents.

"In order that those born of foreign parents in Spanish territory may enjoy the benefits granted to them by No. 1 of Art. 17 it shall be an indispensable requisite that the parents declare, in the manner and before the officials specified in Art. 19, that they choose, in the name of their children, Spanish nationality, renouncing any other.

"19. Children of a foreigner born in Spanish dominion should declare, within the year following their majority or emancipation, if they desire to enjoy the quality of Spaniards which Art. 17 concedes to them."

In Siam *jus soli* and *jus sanguinis* are given equal weight. Under a law of April 10, 1913, Siamese nationality is granted unconditionally first, to every person born of a Siamese father, and second, to every person born in Siamese territory.

In the following countries nationality seems to be based solely on *jus sanguinis*: Austria, Hungary, Germany, Norway, Russia, Roumania, Serbia, China, and Japan. But under a Japanese law of March 15, 1916, a Japanese person born in a foreign country, who is a citizen thereof under its law, may renounce Japanese nationality with the consent of the Minister for Home Affairs. One under age must obtain the consent of his legal representative. In the law of Salvador, while citizenship is based upon *jus sanguinis*, there is a special provision under which a child born in Salvador of a foreign father and a Salvadorean mother is Salvadorean unless he elects the nationality of his father at majority.

In France, Denmark, and Belgium, while nationality may be said to be based primarily on *jus sanguinis*, the principle of *jus soli* is recognized, with limitations. The French law of nationality was formerly based upon *jus soli*,³⁰ but provisions based upon *jus sanguinis* were introduced in the latter part of the 18th century, and finally, by the Civil Code of 1804, the principle of *jus sanguinis* was adopted exclusively. Experience showed, however, that the pendulum had swung too far. The large numbers of persons born in France of alien parents and continuing to reside there, without French nationality and its

³⁰ "Et Pothier (1699-1772), faisant directement allusion aux enfants qui naissent en France, fait observer que 'on ne considère pas s'ils sont nés de parents français ou de parents étrangers,' et même 'si les étrangers sont domiciliés dans le royaume ou s'ils n'y sont que passagers; la seule naissance dans le royaume donne les droits de naturalité indépendamment de l'origine du père et de la mère et de leur demeure (2).' L'homme appartenait à la terre, à la glèbe." 2 Calvo, *Droit international*, *op. cit.* note 3, at p. 28.

accompanying obligations and with practically no nationality, were found to be more and more embarrassing, and, beginning in the year 1851, several statutes were enacted to meet this situation. They were necessarily based upon *jus soli*. The experience of France proves that it is practically impossible for any country in which there is a large alien population to have its law of nationality based solely upon the rule of descent.

Under the Law of Nationality of June 26, 1889,³¹ French nationality is extended to every person born in France of a foreigner and who at the time of attaining his majority is domiciled in France, unless during the following year he declines French nationality and proves that he has preserved the nationality of his parents by a certificate of his government. Under Article 9 of this law every person born in France of a foreigner and who is not domiciled there at the time of attaining his majority may, up to the age of twenty-two years completed, make his application to establish his domicile in France, and if he establishes it there within a year after filing his application, he may claim French nationality by means of a declaration which shall be filed in the Ministry of Justice. Under paragraph 3 of Article 8, as amended by a law of July 22, 1893, a person born in France of foreign parents, of whom one was also born there, is a Frenchman, except that he has the privilege, if it was his mother who was born there, of declining French nationality within the year following the attainment of his majority. I shall advert later on to these provisions of the French law for election of nationality.

The second paragraph of the Danish law of nationality of March 19, 1898, contains a provision similar to that of the fourth paragraph of Article 8 of the French law, except that the age of majority for this purpose is nineteen years completed and the election of foreign nationality must be made within the last year.

Under Article 7 of the Belgian Law of Nationality of June 8, 1909, the following become Belgian at the expiration of their 22nd year if during that year they have had their domicile in Belgium and have not declared their intention of retaining their foreign nationality:

(1) A child born in Belgium of foreign parents one of whom was himself born there or has been domiciled there for ten years continuously;

(2) A child born in Belgium of a foreigner and who has been domiciled in the Kingdom for the last six years continuously.

Section 2 of the Swedish Law of Nationality of Oct. 1, 1894, closely resembles the fourth paragraph of Article 8 of the French law. Under this section a person born in Sweden of foreign parents, and domiciled three until he attains the age of 22 years, becomes a Swedish citizen unless during the year previous he makes a formal election of the nationality of his parents.

³¹ Art. 8, par. 4.

Under the law of Italy, as under the laws of the countries last mentioned, nationality is based primarily upon *jus sanguinis*. However, Article 3 of the Italian law of June 13, 1912 provides that an alien born in the Kingdom or born of parents resident therein for 10 years prior to the time of his birth becomes an Italian citizen—(1) if he performs military service in the Kingdom or accepts government employment; (2) if, being resident in the Kingdom on the completion of his twenty-first year, he declares within his twenty-second year that he adopts Italian nationality; or (3) if, having resided in the Kingdom for at least ten years he does not declare within the time limit specified in (2) that he desires to retain his non-Italian nationality.

The nationality law of Bulgaria of 1903 is modeled after the French law of 1889, and resembles it very closely.

In Greece, while nationality is based principally upon descent, there is a provision in Article 19 of the Civil Code under which persons born in Greece of alien parents may acquire Greek nationality within the year following the attainment of majority by declaring before the municipal authority of their domicil their intention to establish themselves in the country and taking the oath of citizenship before the prefect.

In Switzerland citizenship depends upon the laws of the various cantons, but the latter are limited by federal law. Formerly Swiss citizenship depended entirely upon descent, but by a federal statute of June 25, 1903, the cantons were authorized to provide by law for acquisition of Swiss citizenship at birth, if (1) the mother was of Swiss origin; or (2) the parents had been domiciled in Switzerland five years at the time of the child's birth, but in either case the person concerned should have the right of election. The experience of Switzerland with regard to nationality laws seems to have been similar to that of France, *jus sanguinis* alone having proved to be unsatisfactory.³²

³² The federal Council of Switzerland has recently proposed to the Assembly an amendment of Article 44 of the Constitution, under which it will be possible for the Assembly to pass a law granting Swiss citizenship directly, without cantonal action, to children of domiciled aliens. Article 44, as amended, is to contain the following provisions:

"The federal legislation will rule on the conditions of the acquisition or loss of Swiss citizenship."

"The federal Assembly can introduce the acquisition of Swiss citizenship by incorporation. It can decide in particular that a child of foreign parents domiciled in Switzerland at the time of its birth is a Swiss citizen by incorporation, if his mother is of Swiss origin or if either his father or mother were born in Switzerland. The child thus incorporated obtains from the time of his birth the citizenship of that community where his parents at the time of his birth were domiciled."

The proposed amendment will have to be approved by both chambers of the federal Assembly, and then by a vote of the people. The federal Council has also proposed a federal statute to carry out the provisions of the amendment just quoted. It contains a provision to the effect that persons of the classes referred to shall not be permitted to elect the nationality of their parents.

The law of nationality of Persia contains a mixture of *jus soli* and *jus sanguinis*. All persons born in Persia of Persian parents or of a Persian mother are Persians. Also children born in Persia of alien fathers are aliens, but they have the right to reclaim Persian nationality at majority, which, under Musulman law, is the age of sixteen.

In the law of Haiti citizenship is based primarily upon descent, but there is a special provision under which a person born in Haiti of an alien father has Haitien nationality, provided his father is an African.

Article 30 of the Mexican Constitution of February 5, 1917, contains the following provision:

"Mexicans by birth are those born of Mexican parents, within or without the Republic, provided in the latter case the parents be also Mexicans by birth. Those born within the Republic of foreign parentage shall likewise be considered Mexicans by birth, who within one year after they come of age shall declare to the Department of Foreign Affairs that they elect Mexican citizenship, and who shall furthermore prove to the said Department that they have resided within the country during the last six years immediately prior to the said declaration."

The principal provisions of the Cuban law concerning native citizenship are found in the first and second sections of Article 5 of the Constitution, which state that native Cubans are:

"First. Those born of Cuban parents within or without the territory of the Republic;

"Second. Those born within the territory of the Republic of foreign parents, provided that on becoming of age they claim the right of inscription as Cubans in the proper register."

The provisions of the Costa Rican law concerning native citizenship are quite strict. The principal provisions are found in sections 1, 2, and 3 of Article 5 of the Constitution, which state that the following are native Costa Ricans:

"1. All persons born in the territory of the Republic, except those who, being the issue of a foreign father or mother, should, under the law, be clothed with foreign nationality of the latter.

"2. The children of a Costa Rican father or mother, born outside the territory of the Republic, whose names have been inscribed in the civil register, by their parents during their minority, or by themselves after reaching full age.

"3. The children of a foreign father or mother born in the territory of the Republic who, after having reached the age of twenty-one years, register themselves as Costa Ricans, or were registered as such by their parents before reaching that age."

As the laws of most countries extend their nationality to persons born abroad to their citizens it is obvious that most persons born in Costa Rica of alien parents are not Costa Ricans unless they make the express election provided in section 3. As a similar election is required of persons born abroad of Costa Ricans, it seems probable that there are comparatively few native Costa Ricans except those born in Costa Rica of Costa Rican parents.

Under the Netherlands law of December 12, 1892, native citizenship is based primarily upon *jus sanguinis*, but Article 2 provides that the following is likewise a Netherlander:

"The child of a resident who, whether father or mother, according to the distinctions made in Article 1, was born himself or herself of a mother residing in the Kingdom, unless it is ascertained that the child, as a foreigner, belongs to some other country."

RECOGNITION BY SECRETARIES OF STATE OF THE PRINCIPLE OF ELECTION

From the above review of the nationality laws of foreign countries³³ it will have been observed that a number of them contain provisions for election of nationality, at majority, by persons born with dual nationality, but that these provisions are widely divergent. As a result of this divergence it frequently, if not usually, happens that an election duly made under the law of one country is not recognized under the law of the other interested country. Thus these provisions are well nigh useless so far as the settlement of conflicting claims to allegiance is concerned. Our own country has been more backward than any other country of importance in the effort to provide by statute a way of settling cases of dual nationality. No effort whatsoever was made until the passage of the Citizenship Act of March 2, 1907, the 6th section of which contains a provision concerning persons born abroad of American citizens. This provision, as we shall see later, is of doubtful meaning and questionable effect. However, the executive branch of the government has for many years recognized and applied the principle of election in connection with the issuance of passports or the extension of protection to persons residing abroad, who were born abroad of American parents or were born in this country of alien parents.

It is said that the doctrine of election originated with the French Civil Code. I am unable to state when it was first recognized and applied by the Department of State. Professor Moore cites³⁴ a letter of September 10, 1867, from Secretary Seward to a Mr. Vantossel, who was born in Chile of an American father, in which he said:

"Until you make your election to reside in this country, it is not in the power of this Government, to protect you against the enforcement of any obligations you may be under as a citizen of Chile."

It seems altogether likely that the statement of Secretary Seward just quoted was not the first recognition by the Department of State of the principle of election. The courts had long before the date of the

³³ My information concerning nationality laws, except those of the United States, Great Britain, and France, and laws of other countries passed since 1909, was obtained principally from the Citizenship Board Report of 1906 (H. R. Doc. 326, 59th Cong., 2d sess.) and Ernest Lehr, *La nationalité dans les principaux états du globe* (1909).

³⁴ 3 Moore, *International Law Digest* (1906) 526. This book will be cited as "Moore."

letter just mentioned recognized the principle of election, although the extent to which it may be regarded as actually a part of the law of this country is, as we shall see, still somewhat doubtful.

As to the proper time for election, Secretary Bayard, in an instruction of July 24, 1886, to the Chargé d' Affaires at Vienna, concerning the case of one Friedrich de Bourry, who was born in the United States of Austrian parents and went in early childhood to Austria to reside, said

"An election in a case of dual or doubtful allegiance . . . must be made on attaining majority, or shortly afterwards, and must be signified by acts plainly expressive of intention, such as immediate preparations to return to the elected country."³⁵

About three years had elapsed since de Bourry had attained his majority, and Secretary Bayard said:

"In the present case there is no evidence that an election to become a citizen of the United States was ever made or intended, but on the contrary all the facts create the presumption that an Austrian domicile was chosen."

Professor Moore cites a number of other cases in which failure on the part of a person residing abroad to make a proper election within three or four years after the attainment of majority was held to have resulted in a loss of the right to the protection of this government.³⁶

There seems to be a current belief that citizenship acquired by birth in the United States has a peculiar virtue, which does not exist in citizenship acquired under *jus sanguinis*, but the Department of State has been quite as strict in applying the principle of election in the one class of cases as in the other.

In an instruction of December 31, 1878, to the Minister at Paris concerning one Henry Tirel, who was born in Philadelphia September 28, 1857, of French parents and desired an American passport to enable him to escape military service in France, Acting Secretary of State Seward said:

"Mr. Tirel is not, under the facts and circumstances stated in your despatch, entitled to a passport or to any protection from this Government against such obligations as the laws of France may impose on him. Having attained his majority, the effect of his declared intention not to return to the United States works a voluntary act of expatriation. Should he hereafter change that intention and come to the United States and there remain subject to its jurisdiction, his claims of citizenship under the Constitution and the laws of the Republic will then receive due consideration."³⁷

In 1895 Acting Secretary Adee approved the action of the Minister at Vienna in refusing to intervene in behalf of one Edward Kovacsy, who was born in the United States of Hungarian parents and was at

³⁵ For. Rel. 1886, 12; 3 Moore, 547.

³⁶ 3 Moore, 549-551. See also 1 For. Rel. 1906, 657, and 2 *id.* 1180.

³⁷ 20 MSS. Instructions to France, 7.

the time when the Minister's decision was made, twenty-one years of age. His case, however, was aggravated by the fact that he admitted that he had no intention of coming to the United States to reside.³⁸

In stating the grounds of his refusal, the Minister laid special stress upon domicil as the decisive point in election. He said that he would accept nothing less than "an actual renouncement of the domicil so long maintained in Hungary and a return to the United States in good faith to make it his permanent home." As we have seen, Secretary Bayard emphasized this same point in the case of de Bourry, mentioned above, and it has always been recognized by the Department of State as an indispensable element of election, indeed the basic and decisive element. A mere declaration of election is of itself of little or no value. The person making the election must prove his good faith by actually abandoning his foreign domicil and coming to the United States, to reside and fulfill the obligations of citizenship, or must show that he has a definite intention of doing so in the immediate or near future. The rule was succinctly stated by Secretary Bayard in a note of April 10, 1888, to the Danish Minister at Washington, in which he said:

"A child born abroad of American parents, or in the United States of foreign parents, although subject to the parental domicil during minority, has, on becoming *sui juris*, the right of election of citizenship; and, in the event of choosing American nationality, the best proof of such election is to be furnished by continued residence in the United States, or by return hither, if abroad, and the discharge of the duties and obligations of the elected citizenship."³⁹

Secretary Olney, in a letter of December 27, 1895, to one Ory, who was born in Cuba of a naturalized American father of Cuban origin, and who had continued to reside in Cuba for some years after attaining his majority, said:

"Admitting, however, that your father was a citizen of the United States at the date of your birth, you and your brothers, in order to conserve your American citizenship, should, on reaching your majority, have come to the United States to reside. You are no longer 'children.' Your citizenship is no longer derivative, but a matter of personal election. You did not come to the United States on attaining your majority, nor do you now express any intention of ever coming to this country to reside. You are therefore, in the Department's opinion, clearly not entitled to claim the protection of this Government."⁴⁰

The rule concerning change of residence has been reiterated by the Department of State in many cases, too numerous to mention.⁴¹

Before the passage of the Citizenship Act of March 2, 1907, no special formality was required in an election. The Department consid-

³⁸ Mr. Adee to Mr. Tripp, July 23, 1895, 1 For. Rel. 1895, 20, 3 Moore, 549-550.

³⁹ 1 For. Rel. 1888, 489; 3 Moore, 548.

⁴⁰ 3 Moore, 550.

⁴¹ See cases cited in 3 Moore, secs. 430, 514, and Van Dyne, *op. cit.* note 18, chs. 1, 2, Part I.

ered deeds rather than words as decisive. In the oft cited case of Robert Emden, who was born in Switzerland of an American father, Acting Secretary of State Porter said that election "requires no formal act, but may be inferred from the conduct of the party from whom the election is required."⁴² It is true that Secretary Bayard, in an instruction of July 2, 1886, to Mr. Vignaud, Chargé at Paris, said concerning Victor Labroue, who was born in France of a naturalized American father, that his election of American citizenship "must not only be formally and solemnly declared, but must be followed by his coming to and taking up his abode as soon as practicable in the United States."⁴³ In stating that the election must be "formally and solemnly declared," Mr. Bayard seems to have referred to the formality required by the French law in the case of a person who is born in France of alien parents and is still domiciled there when he attains his majority, but wishes to elect the nationality of his parents, rather than French nationality. He observed that "with the law of nations in this respect . . . coincides the law of France." However, he added that "by the law of nations, apart from any municipal legislation, he would be entitled, when of full age, to elect which of the two allegiances he will accept."

In deciding cases of dual nationality the Department of State does not, as a rule, endeavor to ascertain whether the person concerned has made an effectual election of the nationality of the country in which he resides and may be considered a citizen of such country under the laws thereof. In some cases the Department of State has stated that the person concerned should be deemed to have made a "practical election" of the nationality of the country of domicil, or has used words of like purport. Thus, in the case of one David Marks, who had remained in Guatemala, the land of his birth, for five years after attaining his majority, Acting Secretary Adee said that he had "inferentially elected other nationality than that of the United States."⁴⁴ As a practical matter, it would be impossible for the Department of State to undertake to ascertain, in every case of dual nationality, the status of the person concerned under the law of the other country, before deciding his status with regard to the United States. There is much diversity, as we have seen, in the laws of the various countries of the world concerning conditions and methods of election, and, while this government endeavors to observe as far as possible the just claims of foreign countries, it is obliged to ground its decisions as to the status of persons with regard to the United States upon its own laws and precedents.

As to the effect of election, it is important to consider whether an election once made is final, that is, in particular, whether an actual or presumptive election of foreign nationality results in a loss of American

⁴² Mr. Porter to Mr. Winchester, Sept. 14, 1885, For. Rel. 1885, 811, 3 Moore, 545.

⁴³ For. Rel. 1886, 303, Van Dyne, *op. cit.* note 18, at pp. 40, 41.

⁴⁴ Mr. Adee to Mr. Coombs, Sept. 15, 1903, For. Rel. 1903, 595, 3 Moore, 551.

citizenship, or whether it results merely in a temporary loss of the right to the protection of this government. There are a number of pronouncements of Secretaries of State to the effect that such an election actually results in a loss of American citizenship. Acting Secretary Porter took this view in the case of Robert Emden.⁴⁵ He declared of election in general that "when once made it is final," and with reference to the specific case he said:

"If, on the other hand, he made no such election, but by remaining in Switzerland is to be inferred to have accepted Swiss nationality, he can not now obtain a passport as a citizen of the United States. If this be the case, his proper course, should he desire to become a citizen of the United States, is to come here in person and become naturalized."

Professor Moore quotes a memorandum of Doctor Francis Wharton of the Department of State, dated May 4, 1885, in which he expressed his opinion that an "election must be regarded as final."⁴⁶ However, the decisions of the Department of State in cases involving election seem to relate generally to the right to protection rather than to nationality as a matter of strict law, for, as the Department has repeatedly stated, the technical legal status of citizenship does not necessarily carry with it the right to protection. Thus, Secretary Fish, in a letter of October 30, 1871, to Mr. Niles, observed that

"citizenship involves duties and obligations, as well as rights. The correlative right of protection by the government may be waived or lost by long-continued avoidance and silent withdrawal from the performance of the duties of citizenship as well as by open renunciation."⁴⁷

In these cases the Department of State, as a rule, did not decide that the legal status of American citizenship was lost by an express or inferential election of the foreign nationality. It merely passed over this question as unnecessary to be decided. Whether or not the persons concerned had lost their legal title to American citizenship, the Department held that they had placed themselves in a position where they were not equitably entitled to the protection of this government. This distinction was brought out by Mr. Adee, then Acting Secretary of State, in an instruction of April 28, 1893, to Mr. Combs, Minister to Japan, concerning the case of one Alexander Powers, who was born in Russia of an American father, was about twenty-one years of age, had never been to the United States nor learned to speak the English language, and desired to obtain a passport to enable him to return to Russia on business. Mr. Adee said:

"Between the legal status of citizenship and the right to continued protection during indefinitely prolonged sojourn abroad, the executive

⁴⁵ *Supra* p. 562.

⁴⁶ 3 Moore, 522. In support of the view that election of foreign nationality terminates American citizenship see also Mr. Seward to Mr. Foster, Aug. 13, 1879, For. Rel. 1879, 825; and dictum in *Ludlam v. Ludlam* (1863) 26 N. Y. 356.

⁴⁷ 91 MSS. Dom. Let. 211, 3 Moore, 762.

authority of the United States draws a clear distinction in exercising its statutory discretion to issue passports as evidence of the right to protection. The relation of the citizen to the state being reciprocal, embracing the duties of the individual, no less than his rights, the essential thing to be determined is the good faith with which the obligations of citizenship are fulfilled.

"The best evidence of the intention of the party to discharge the duties of a good citizen is to make the United States his home; the next best is to shape his plans so as to indicate a tolerable certainty of his returning to the United States within a reasonable time. If the declared intent to return be conspicuously negated by the circumstances of sojourn abroad a passport may be withheld."⁴⁸

The Department of State has drawn a distinction between the cases of persons who are born abroad of American parents and upon reaching majority are residing in the country of their birth, and those of persons who are residing in a third country. In an instruction of November 27, 1891, to the Minister to France concerning three persons who were born in Cuba of a naturalized American father and went during their minority to France to reside, Secretary Blaine held that it was not necessary for them to show that they had made an election of American nationality within a year after attaining majority, since France was not the country of their birth. He said that

"their cases, therefore, are to be determined on precisely the same footing as those of native citizens whose long domicile abroad and absence of definite intention to return create a presumption of voluntary abandonment of claim to protection."⁴⁹

(To be concluded in May)

⁴⁸ For. Rel. 1893, 401, 3 Moore, 931-932.

⁴⁹ 22 MSS. Instructions to France, 255; 3 Moore, 945-946.